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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DOUGLAS P. FIELDS, FREDERICK M. FRIEDMAN and ALAN E. SANDBERG,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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1. Whether the Court of Appeals was in error in holding (a) that a general intent rather than a specific intent to defraud was the correct standard of proof required by the Government on an indictment charging "wilful and knowing" violations of Section 17(a) of the Securities Act of 1933 dealing with the fraudulent sale of securities, and "wilful and knowing" violations of Section 14(a) of the Securities Exchange Act of 1934 dealing with the failure to disclose fraudulent transactions in proxy solicitations, and (b) whether the trial court's instruction to the jury that only a general intent is necessary to convict as distinguished from a specific intent is contrary to the proper standard of intent required under those statutes.

2. Whether the Court of Appeals' decision on the first appeal in reversing the dismissal of the indictment, which was exercised under the District Court's supervisory power as the result of the misconduct perpetrated by enforcement attorneys of the Securities and Exchange Commission, is in conflict with decisions in other Circuits that upheld such action on the part of a District Court in similar situations and is contrary to due process principles prohibiting a conviction under these circumstances.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Douglas P. Fields, Frederick M. Friedman, and Alan E. Sandberg respectfully pray that a writ of of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on July 25, 1980, and also the judgment previously entered by the Court of Appeals on September 14, 1978.

Opinion Below

The Opinion of the Court of Appeals on the second appeal is a summary unpublished opinion. A copy is

annexed hereto as Appendix A. The Opinion of the Court of Appeals on the first appeal is reported at 592 F.2d 638 (2d Cir. 1978), cert. denied, —— U.S. ——, 99 S. Ct. 2838 (1979).

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the Court of Appeals was in error in holding (a) that a general intent rather than a specific intent to defraud was the correct standard of proof required by the Government on an indictment charging "wilful and knowing" violations of Section 17(a) of the Securities Act of 1933 dealing with the fraudulent sale of securities, and "wilful and knowing" violations of Section 14(a) of the Securities Exchange Act of 1934 dealing with the failure to disclose fraudulent transactions in proxy solicitations, and (b) whether the trial court's instruction to the jury that only a general intent is necessary to convict as distinguished from a specific intent is contrary to the proper standard of intent required under those statutes.

2. Whether the Court of Appeals' decision on the first appeal in reversing the dismissal of the indictment, which was exercised under the District Court's supervisory power as the result of the misconduct perpetrated by enforcement attorneys of the Securities and Exchange Commission, is in conflict with decisions in other Circuits that upheld such action on the part of a District Court in similar situations and is contrary to due process principles prohibiting a conviction under these circumstances.

Statutory Provisions

Title 18, United States Code

Section 1001

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Title 28, United States Code

Section 1254(1)

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Securities Act of 1933

Section 17(a), 15 U.S.C. § 77q(a)

> "It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

Section 24, 15 U.S.C. § 77x

"Any person who willfully violates any of the provisions of the subchapter, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this subchapter, makes any untrue statement of a material fact or omits to state any material fact required to be stated thereon or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both."

Securities Exchange Act of 1934

Section 14(a), 15 U.S.C. § 78n(a)

(a) It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name

to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 78*l* of this title.

Section 32, 15 U.S.C. § 78ff

(a) Any person who willfully violates any provision of this chapter, or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78*o* of this title, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $10,000, or imprisoned not more than two years, or both, except that when such person is an exchange, a fine not exceeding $500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

Statement of the Case

In an indictment filed on November 8, 1976 petitioners Fields, Friedman, and Sandberg, and others, were charged with various violations of the federal securities laws. Said petitioners filed pre-trial motions seeking dismissal of the indictment. Among the grounds raised in support was

their contention that during the course of an investigation by the Securities and Exchange Commission ("SEC") concerning the matters that eventually resulted in this indictment, the SEC attorneys in charge of this investigation engaged in fraudulent misconduct inducing petitioners to consent to onerous settlement terms demanded by the SEC. Petitioners agreed to the settlement in reliance on an understanding that had been reached between their attorneys and the SEC attorneys that there would be no criminal reference of this matter, on which the SEC attorneys deliberately and secretly reneged. The District Court (Hon. Charles S. Haight, Jr.), after conducting a pre-trial hearing for over two weeks to determine the facts underlying this contention, dismissed the entire indictment against petitioners Friedman and Sandberg and most of the indictment against petitioner Fields, because of the fraud which the District Court expressly found had been perpetrated by the SEC attorneys upon petitioners. The District Court also dismissed certain portions of the indictment on alternative grounds. The District Court rendered voluminous findings of fact in its memorandum opinion supporting dismissal, which opinion was not officially reported but is unofficially reported at CCH Fed.Sec.L. Rep. ¶ 96,074 (S.D. N.Y. June 2, 1977).

On Appeal by the Government, the Court of Appeals reversed and remanded the case with instructions to reinstate in all respects the unexpurgated indictment (*United States* v. *Fields, et al.*, 592 F.2d 638 (2d Cir. 1978). While not overturning any of the District Court's findings of fact concerning the fraud perpetrated upon petitioners by the SEC attorneys, the Court of Appeals held that the remedy of dismissal was not an appropriate remedy for the SEC's fraud.

Petitioners timely filed such a petition, which was denied by this Court on June 4, 1979 (—— U.S. ——, 99 S.Ct. 2838 (1979)), to which reference is made hereinafter at pp. 22-23).

The indictment as originally returned charged petitioners and others in twelve counts with various violations of the securities laws.* Prior to its order of dismissal in 1977, the District Court, on motion of petitioners to which the Government consented, severed Counts 1-5 from Counts 6-11.**

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* On the Government's appeal from Judge Haight's Order of dismissal, the Court of Appeals charted the charges against each of the original defendants as follows (592 F.2d at 641, n. 3):

Count	*Defendant*	*Violation*	*Statute*
One	Fields, Friedman, Davis	Conspiracy to violate securities laws	18 U.S.C. § 371
Two	Fields, Friedman, Davis	Securities fraud	15 U.S.C. § 77q(a)
Three	Fields, Friedman, Davis	Filing false prospectus	18 U.S.C. § 1001
Four	Fields, Friedman, Davis	Soliciting proxies with false proxy statements	15 U.S.C. § 78n(a)
Five	Fields, Friedman, Berge, Davis	Soliciting proxies with false proxy statements	15 U.S.C. § 78n(a)
Six	Friedman, Sandberg	Wire Fraud	18 U.S.C. § 1343
Seven-Ten	Friedman, Sandberg	Mail Fraud	18 U.S.C. § 1341
Eleven	Friedman	Soliciting proxies with false proxy statements	15 U.S.C. § 78n(a)
Twelve	Berge	False testimony before the SEC	18 U.S.C. § 1001

** Count 12 had been charged only against Berge, who died prior to being tried.

On October 9, 1979, trial on those counts began before Judge Haight and a jury. After a trial of approximately a month, the jury, on November 8, 1979, convicted petitioners Fields and Friedman on all counts. The judgments of conviction entered on January 10, 1980 were affirmed by the Court of Appeals in a per curiam summary opinion dated July 25, 1980 (copies of the judgments are annexed hereto as Appendix B). A petition for rehearing and a suggestion in the alternative for rehearing en banc and a motion for a stay of the judgment pending application to this Court for a writ of certiorari was denied by the Court of Appeals on September 2, 1980. (Copies are annexed hereto as Appendix D). An application for a stay pending the filing of this petition and a determination thereof was denied by Mr. Justice Marshall on September 17, 1980.

The Facts

Viewed in the light most favorable to the Government, the Government's proof at trial established that petitioners Fields and Friedman engaged in the following transactions: (a) in 1971, they conspired to cause Westcalind to pay an improper "finder's fee" of $50,000 to a third party in connection with Westcalind's acquisition of a company called Emblem & Badge, and shared in the profits of this "finder's fee", and (b) in 1971, they refused to free-up restricted TDA stock held by various third parties, which required those third parties, who wanted to sell their shares to sell the shares to said petitioners' co-conspirators, who thereupon resold those shares at a substantial profit, kicking back 70% of those profits to said petitioners. However, the indictment did not charge said petitioners with the commission of either of these offenses; prosecution for these offenses was barred by the applicable statute of limitations. Rather, the indictment

charged said petitioners with having violated the securities laws and 18 U.S.C. § 1001 concerning the alleged wilful and knowing non-disclosure of those transactions in a prospectus and two proxy statements filed with the SEC. Yet the Government's proof at trial failed to establish, either directly, indirectly, or circumstantially, that either petitioner was aware at the time of the commission of these underlying offenses, or at the time of the filings of the prospectus and proxy statements with the SEC, that the underlying transactions were required by law to be disclosed in those filings.

Petitioners Fields and Friedman on these grounds, inter alia, moved for judgment of acquittal at the conclusion of the Government's case, at the conclusion of all of the evidence, and in post-trial motions which were denied (T*1935, 3015; A** 85). Requests to charge the jury that it was incumbent on the Government to prove beyond a reasonable doubt "that the defendants knew that under the applicable statutes and SEC rules and regulations that they were required to disclose [their alleged illegal conduct] in the SEC filings involved and that they knowingly, wilfully, and deliberately . . . decided not to make such disclosures notwithstanding their alleged knowledge of such a requirement" were denied by the District Court (Request No. 22, A 82-83; also Requests Nos. 18 and 20, A 80-81).

Instead, the District Court instructed as follows:

> "To satisfy this element the government must prove with respect to the particular defendant you

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* The letter "T" followed by a number designates page reference to the trial transcript.

** The letter "A" followed by a number designates page reference to the Joint Appendix in the Court of Appeals.

are considering that his failure to disclose material facts in the prospectus was knowing and wilful and that in failing to make such disclosure the defendant had a general awareness of wrongful conduct based upon a realization that his acts were wrongful under the securities laws.

"I shall define these terms for you. An act is done knowingly if it is done voluntarily and intentionally and not because of mistake or accident or other innocent reason. An act is done wilfully if it is done intentionally and deliberately.

"Knowingly means that the defendant must be aware of what he was doing and what he was not doing. Wilfully means that the defendant acted deliberately and intentionally and his acts, statements or omissions were not the result of innocent mistake, negligence or inadvertence or other innocent conduct.

"However, for the government to satisfy this element it is not sufficient that it show that a particular defendant acted knowingly or wilfully as I defined those terms. The government must show that, that the acts were knowing and wilful, but it must also establish beyond a reasonable doubt that the defendant had some evil purpose.

"It is not necessary that the government prove that the defendant intended specifically to violate a particular section of the securities law. The government must prove, however, that the defendant had actual knowledge of the false or misleading character of the prospectus, he must have had a general awareness of the requirements of the securities laws in respect of disclosure, a realization that he was doing a wrongful act.

> "This element is satisfied if the government has proved such a state of mind on the part of a defendant, also assuming, of course, that his conduct was wrongful under the securities laws, as I have explained those provisions to you in the previous element, and that the defendant's knowingly wilful act involved a significant risk of effecting the violation that occurred." (T. 3519-3521)

This instruction was contradictory in requiring proof of "some evil purpose" in addition to proof that petitioners acted "knowingly and wilfully" and at the same time instructing the jury that the Government need not prove that "the defendant intended specifically to violate a particular section of the securities law." The instruction, furthermore, was confusing and incorrect. Instead of an instruction that the Government was required to prove a specific intent to defraud, i.e., that the petitioners had knowledge that at the time of the SEC filings they were required by law to disclose the underlying transactions and knowingly decided not to with the intention of defrauding purchasers of the stock and stockholders of TDA, the District Court instructed there only had to be a "general awareness of wrongful conduct based upon a realization that his acts were wrongful under the securities law," a concept of wilfulness scarcely understandable, extremely imprecise, and incorrect.

The Court of Appeals addressed the wilfulness issue only with respect to Counts 4 and 5 relating to the proxy violations under Section 32(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78ff. The Court of Appeals overlooked petitioners' challenge to the Government's proof and the District Court's instruction as to all counts, including Counts 4 and 5, just as it incorrectly asserted that petitioners conceded that if the violation was brought under

the first half of Section 32(a) of the 1934 Act the standard of culpability required was only a "general intent". Said petitioners' requests to charge the jury, referred to previously herein (at p. 9), which specifically were requested with respect to all counts, reflect the inaccuracy of the Court of Appeals' statement. A petition for rehearing was filed with the Court of Appeals suggesting these oversights but, as previously noted, the petition was denied without opinion.

With regard to the violations alleged in Counts 4 and 5, the Court of Appeals did not specifically address the difference in the wilfulness requirement between violations brought under the first half of Section 32(a), in which the conduct prohibited is stated to be "wilful", and in violations under the second half of Section 32(a), in which the conduct prohibited is stated to be "wilfully and knowingly". The Court of Appeals implied that the clauses with respect to intent were merely redundant but that even assuming "the second clause of Section 32(a) does in fact require a specific intent to violate a particular law or regulation . . . the instruction given by the District Judge fairly fulfilled this hypothetical requirement." The Court of Appeals added even if there was a "conceivable shortcoming in the jury instruction it was harmless . . .", presumably because as "high corporate executives" they must have been "well versed in the rules and regulations of the Securities and Exchange Commission." (Appendix A, p. 2). Yet there was no such evidence, and the Court of Appeals' Opinion refers to none.

REASONS FOR GRANTING THE WRIT

1. The District Court failed to charge and the Government failed to prove the specific intent charged in the indictment and required under Sections 17(a) (15 U.S.C. § 77q(a)) and 24 (15 U.S.C. § 77x) of the Securities Act of 1933, Sections 14(a) (15 U.S.C. §78n (a)) and 32 (15 U.S.C. § 78ff) of the Securities Exchange Act of 1934, and Section 1001, Title 18, U.S.C.

The District Court failed to properly instruct the jury and the Government failed to prove the requisite specific intent under Counts 1-5. In reducing "wilfully and knowingly" into a single concept of "general intent", without requiring proof of a specific intent to defraud, the panel of the Court of Appeals adopted a lower standard of cupability than required by the statutes and charged in the indictment.

The effect of the construction of wilfulness adopted by the panel of the Court of Appeals permitted the Government to obtain convictions in this fraudulent non-disclosures case on the basis of the Government's claim in the Court of Appeals that

> "It is therefore correct to charge the jury 'that the Government [is] not required to prove a specific intent on [a defendant's] part to disregard or disobey the law . . .'" (Gov't Brief, p. 19 fn. **)

The result of the Court of Appeals' decision was to consider immaterial petitioners' claim that there was a complete absence of proof of any knowledge on their part of any legal requirement to disclose in the SEC filings the transactions which they were charged with having "wilfully and knowingly" failed to disclose. (See petitioners' requests to charge 18-20, A 80a-81a, which were rejected.)

In addition to the impact on criminal cases, the decision of the Court of Appeals will likewise have its impact on the necessary proof of wilfulness in civil actions since the issue of culpability is the same in a civil action for damages predicated upon the instant statutes. See *SEC* v. *Joiner,* 320 U.S. 344, 355, 64 S.Ct. 120, 125 (1943); *Mallis* v. *Federal Deposit Ins. Corp.,* 568 F.2d 824, 829 (2d Cir. 1977), cert. dis., *sub nom. Bankers Trust Company* v. *Mallis,* 435 U.S. 381 (1978).

We submit that the Court of Appeals improperly lowered the degree of culpability required in fraud actions under the Securities Acts of 1933 and 1934 and that in so doing it departed from the stricter standard announced by this Court in *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 96 S.Ct. 1375 (1976). In *Hochfelder,* this Court held that in a private action for damages under Section 10(b) and Rule 10b-5, it was necessary to allege and prove "scienter" —defined as an "intent to deceive, manipulate or defraud." 425 U.S. at 197, 96 S.Ct. at 1383. Cf. *Santa Fe Industries, Inc.* v. *Green,* 420 U.S. 462, 474-475, 97 S.Ct. 1292, 1301-1302 (1977).

Although *Hochfelder* dealt with a Section 10(b) and Rule 10b-5 private action for damages under the 1934 Act, this Court expressly noted:

> "Although adopted pursuant to Section 10(b), the language of the Rule [10b-5] appears to have been derived in significant part from § 17 of the 1933 Act, 15 U.S.C. § 77q." 425 U.S. at 212 n. 32, 96 S.Ct. at 1390 n. 32.

Moreover, decisions of this Court interpreting wilfulness in other criminal statutes prohibiting false and fraudulent filings with a Government agency further demonstrate

the error of the Court of Appeals in adopting a standard of general intent rather than of specific intent to defraud. Thus, in *United States* v. *Bishop,* 412 U.S. 346, 93 S.Ct. 2008 (1973), involving a charge of filing a false and fraudulent tax return under the Internal Revenue Code, the wilfulness required under that statute, said this Court, was proof of a "voluntary intentional violation of a known legal duty." 412 U.S. at 360, 93 S.Ct. at 2017. This Court reiterated and approved the *Bishop* standard in *United States* v. *Pomponio,* 429 U.S. 10, 97 S.Ct. 22 (1976). Applying that standard of proof of a "known legal duty" to the instant case required in the very least that before said petitioners here could be convicted, there had to be proof beyond a reasonable doubt that they had a specific intent not to disclose their alleged illicit transactions in SEC filings *which they knew they were required by law to disclose therein.*

The decision in *Hochfelder* on the intent required has been either narrowly confined to Section 10(b) actions or held inapplicable to Section 17(a) criminal actions. See, *e.g., Nelson* v. *Serwold,* 576 F.2d 1332 (9th Cir. 1978) cert. denied, 439 U.S. 970 (1978), Section 10(b) and Rule 10b-5 private action (as to scienter the Court of Appeals said, ". . . the [Supreme] Court [in *Hochfelder*] expressly limited that definition to the case before it." 576 F.2d at 1337); *SEC* v. *Blazon Corp.,* 609 F.2d 960 (9th Cir. 1979), an action for an injunction for violations of Section 17(a), 15 U.S.C. § 77q(a), and Section 10(b) and Rule 10b-5 (the Court of Appeals said, as to scienter, *Hochfelder* is not in point because "it involved only § 10(b) and Rule 10b-5, and the [Supreme] Court relied heavily upon the language of § 10(b) . . . This is very different language from that of § 17(a)(2) and (3)." *Ibid,* at 966; *United States* v. *Charnay,* 537 F.2d 341 (9th Cir.

1976), cert. denied, *sub nom. Davis* v. *United States,* 429 U.S. 1000 (1976), indictments re violations of Section 10(b) and 15 U.S.C. § 78ff and 18 U.S.C. § 1343 (as to scienter, the Court of Appeals said that *Hochfelder* "was a civil action for damages for alleged negligent conduct." *Ibid.* at 358. "This case obviously involves more than negligent conduct." *Idem.* The Court of Appeals distinguished its earlier decision in *United States* v. *Piepgrass,* 425 F.2d 194 (9th Cir. 1970), on the issue of wilfulness in the § 10(b) prosecution before it on the ground that *Piepgrass* "involved a prosecution under § 77q(a)." *Ibid.* at 352 n. 19).

Besides deviations from the standard of culpability in *Hochfelder,* decisions as to the proper meaning of wilfully in civil and criminal actions under the Securities Acts of 1933 and 1934 are divergent, confusing, and difficult to understand. In *United States* v. *Charnay, supra,* after this Court's opinion was announced in *Hochfelder,* the Court of Appeals said in a petition for rehearing:

> "Although we did state that the cases have held that there is no requirement of proof that a defendant knew he was violating a particular S.E.C. rule, we did not hold that scienter *per se* was not a required element of the offense. Rather we noted that it was necessary for the prosecution to show an intentional act with a 'realization on the defendant's part that he was doing a wrongful act.' Similarly, Judge Sneed in his concurring opinion noted that 'the intent necessary . . . is merely that of intending to do the acts prohibited, rather than intent to violate the statute.' These statements are consistent with the holding in *Ernst & Ernst.*" 537 F.2d at 358.

In its later decision in *SEC* v. *Blazon Corp.,* 609 F.2d *supra* at 966 n. 2, the Court stated:

> "In *United States* v. *Charnay*, 9 Cir., 1976, 537 F. 2d 341, 358-359, we held that scienter must be shown in a criminal action under § 10(b) and Rule 10b-5. That action was brought only under § 10(b) and not under § 17(a) and thus that decision does not control our decision in this case."

In *Roe* v. *United States*, 287 F.2d 435 (5th Cir. 1961), in a criminal action involving the sale of securities in violation of 15 U.S.C. § 77q(a) and the sale of unregistered stock in violation of 15 U.S.C. §§ 77e and 77x, the Court of Appeals declined to define the wilfulness required on the ground that it was not adequately raised below. After the reversal of the conviction on the second appeal in *Roe* v. *United States*, 316 F.2d 617 (5th Cir. 1963), the Court of Appeals noted that "the Government had to establish . . . (b) that their [defendants'] actions were wilfully and knowingly done . . ." In a footnote the Court of Appeals stated that they "avoid again . . . the necessity of determining that meaning of the term 'willfully.'" However, the Court of Appeals did not reject the District Court's instruction defining the term as follows:

> "'The word "knowingly" means done with knowledge, consciously and intelligently. The word "willfully" means done deliberately and intentionally, with knowledge at the time that the conduct is an unlawful act.'" 316 F.2d supra at 621 n. 9.

United States v. *Custer Channel Wing Corp.*, 376 F.2d 675 (4th Cir. 1967), involved a criminal contempt proceeding for violation of an injunction prohibiting the sale of unregistered stock in violation of Section 5 of the Securities Act of 1933, 15 U.S.C. § 77e(a) and (c). In dealing with the defendants' contention that there had to be proof of a specific intent to violate the injunction, the Court of Appeals said:

> "A number of courts have indicated that in criminal prosecutions for violation of section 5, it is not necessary to prove specific intent to violate the law. All that need be shown to sustain a conviction is that the defendant has intentionally sold . . . unregistered securities through the mails or in interstate commerce." 376 F.2d *supra* at 680

In *United States* v. *Danser,* 26 F.R.D. 580 (D.C. Mass. 1959), aff'd, 281 F.2d 492 (1st Cir. 1960), an indictment charged violations of Section 17(a), 15 U.S.C. §§ 77q(a) and 77x. Counts 3 and 10 charged the offer and sale of stock pursuant to a scheme to defraud by filing a prospectus which in Count 3, it was alleged the prospectus "*contained false and misleading financial statements,*" and in Count 10 with respect the same prospectus it was alleged the prospectus "*omitted to state material facts* which were necessary in order to make the registration statement not misleading." 26 F.R.D. *supra* at 584. The District Court instructed the jury on Count 3:

> "It is the burden of the prosecution to prove beyond a reasonable doubt that when [the defendant] signed the registration statement [the defendant] knew that he was making a false statement and intended to defraud." 26 F.R.D. *supra* at 587.

The District Court instructed the jury on Count 10 that the Government must prove beyond a reasonable doubt that "*at the time* [*the defendant*] *caused the prospectus to be delivered by mail,* . . . [the defendant] both knew of these omissions and intended to defraud either the underwriters or investors . . ." 26 F.R.D. *supra* at 588 (italics in original). In further elaborating on this instruction, the Court said that the Government must prove that the defendant's "omission to disclose those losses was moti-

vated by an intent to cheat, deceive, or defraud underwriters or investors, or both. To secure a conviction under Count 10 the Government must prove beyond a reasonable doubt not merely that there was an omission, that the omission was material, and that [the defendant] knew of the omission, but also that [the defendant] intended to defraud." 26 F.R.D. *supra* at 588.

In *Tarvestad* v. *United States* 418 F.2d 1043 (8th Cir. 1969), cert. denied, 397 U.S. 935 (1970), indictment for the sale of securities in violation of 15 U.S.C. §§ 77q(a) and 77x and the sale of unregistered stock in violation of 15 U.S.C. §§ 77e(5) and 77x, the Court of Appeals said that:

> "Some courts including this circuit, have held or at least intimated that the term 'willful' under a § 77e(a) et seq. violation requires only evidence to establish that a defendant intentionally sold . . . securities by use of the mails. It has been held that actual knowledge that a security was being sold in violation of the law is not a necessary element absent a charge of fraud. [Cases cited]. Contrary holdings exist. [Case cited]." 418 F.2d *supra* at 1047.

The District Court's charge upheld by the Court of Appeals was as follows:

> "'An act is done "willfully" if it is done knowingly and deliberately with bad purpose. In determining whether a defendant has acted willfully, however, it is not necessary for the government to show that any defendant knew he was breaking any particular law.
>
> "'Knowledge and willfulness of a defendant need not be proved by direct evidence, and, like any other

> fact in issue, may be established by circumstantial evidence. Here, as in other phases of this case, the significant fact is the defendant's state of mind.'" *Idem.*

In *United States* v. *Brown,* 578 F.2d 1280 (9th Cir. 1978), cert. denied, 439 U.S. 927 (1978), in an indictment for sale of stock in violation of 15 U.S.C. §§ 77q(a) and 77x, the Court stated:

> "We think that the government is required to prove specific intent . . . as it relates to the action constituting the fraudulent, misleading or deceitful conduct, but not as to the knowledge that the instrument used is a security under the Securities Act." 578 F.2d *supra* at 1284.

The Court of Appeals then noted by referring to decisions in the Court of Appeals for the Second Circuit that proof of a specific intent to violate the law is not necessary to uphold a conviction under Section 32(a) of the Securities Act of 1934, 15 U.S.C. § 78ff. In *United States* v. *Pray,* 452 F.Supp. 788 (D.C.Pa. 1978), in an indictment charging violations of Section 10(b) and other Securities Act voilations, including Section 32(a), 15 U.S.C. § 78ff, the District Court stated:

> "Moreover, each count of the indictment relating to violations of the securities laws contains the words 'knowingly and willfully,' and § 78ff makes only knowing or willful violations of the securities law a crime." 452 F.Supp. at 799.

These cases illustrate the need for more direct guidance from this Court than was provided in *Hochfelder* in interpreting the standard of culpability required under the Securities Acts of 1933 and 1934. In cases such as this

involving alleged criminal or fraudulent civil filings, a higher, not a lower, degree of culpability is required in view of the serious penalties which attach to such violations whether in prison penalties or damages. By lowering the standard of wilfulness the Court of Appeals has broadened accessibility to the anti-fraud provisions of the Securities Acts of 1933 and 1934 which unquestionably will result in unwarranted convictions as well as an increase in vexatious and uncontrolled civil litigation. For these reasons the Court should grant certiorari to resolve this important issue.

2. The Court of Appeals' earlier decision in this case reversing the District Court's dismissal of substantially all counts of the indictment in the exercise of the District Court's supervisory powers because of the misconduct perpetrated by SEC enforcement attorneys conflicts with decisions in other Circuits that have upheld such action on the part of District Courts in similar situations.

This issue was previously raised on petition for certiorari by the same petitioners, Fields, Friedman, and Sandberg, Docket Nos. 78-1474 and 78-1483. Certiorari was denied at that time after the Government objected to the granting of the petition, claiming that the issue was interloctury and non-final. The brief of the Government in opposition stated:

> "1. Even if petitioners' claims would otherwise merit review, this Court should not now consider their challenges to the court of appeals' reinstatement of the indictment. The ruling below places petitioners in precisely the same procedural position they would have occupied if the district court

had denied their motions to dismiss. Such an interlocutory order would not have been subject to pretrial appeal. See *United States* v. *MacDonald*, 435 U.S. 850, 853-863 (1978); *Cogen* v. *United States*, 278 U.S. 221, 222, 224 (1929). The same considerations that counsel against interlocutory appeals of denials of motions to dismiss weigh against interlocutory review by this Court of the issues now presented by petitioners. Petitioners were indicted over two years ago and have not yet been tried. At trial, petitioners may be acquitted, in which event their claims will be moot. If, on the other hand, petitioners are convicted and their convictions are affirmed, they will be able to present all of their contentions to this Court when seeking review of the final judgment. See generally *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook Railroad Co.*, 389 U.S. 327, 328 (1967)." (Gov't Brief in Opposition, pp. 7-8).

This Court's denial of certiorari was without opinion. Such a previous denial of certiorari should not deprive petitioners of their right to seek a review at this time. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 257-259, 36 S.Ct. 269, 271 (1916). In that case, as here, certiorari was denied on an application to review a decision of the Court of Appeals on the first appeal. This Court rejected the contention that a second writ could only raise questions that were before the Court of Appeals on the second appeal in view of the interlocutory posture of the case when certiorari was requested from the first appeal. In so holding, this Court stated:

"It is contended that this question is settled otherwise, at least as between these parties, by the deci-

> sion of the circuit court of appeals on the first appeal, and our refusal to review that decision upon complainant's petition for a writ of certiorari, and that the only questions open for review at this time are those that were before the court of appeals upon the second appeal. This, however, is based upon an erroneous view of the nature of our jurisdiction to review the judgments and decrees of the circuit court of appeals by certiorari under § 240, Judicial Code [36 Stat. at L. 1157, chap. 321], derived from § 6 of the Evarts act of March 3, 1891, 16 Stat. at L. 828, chap. 517, Comp. Stat. 1913 § 1217. * * * The decree that was sought to be reviewed by certiorari at complainant's instance was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application; * * * although in this instance the interlocutory decision may have been treated as settling 'the law of the case' so as to furnish the rule for the guidance of the referee, the district court, and the court of appeals itself upon the second appeal, this court, in now reviewing the final decree by virtue of the writ of certiorari, is called upon to notice and rectify any error that may have occurred in the interlocutory proceedings."

We believe it is not necessary to again set forth what has been argued in the prior petitions and replies to the Government's brief in opposition on this issue. The District Court dismissed all of the indictment against petitioners Friedman and Sandberg, and virtually all of the indictment against petitioner Fields, in the exercise of its supervisory powers and because of a gross fraud that had been perpetrated on petitioner by SEC enforcement attorneys. We respectfully refer the Court to the arguments advanced in petitioners' 1978 petition for a writ of certi-

orari. See Docket No. 78-1474, pp. 22-25, and reply brief, pp. 8-9, and Docket No. 78-1483, pp. 7-21, and reply brief, pp. 2-3. The relevant portions are annexed hereto as Appendix C.

The divergence of opinion of other courts from that of the Court of Appeals, we submit, demonstrated in the prior petition, shows the importance of this Court's intervention in order to safeguard the proper administration of criminal justice in the Federal courts, as well as due process principles which should prohibit convictions under these circumstances. This Court appropriately stated:

> "[W]e may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *United States* v. *Russell,* 411 U.S. 423, 431-432 (1973).

We respectfully submit that in view of the gross fraud perpetrated by the Government agents here, this is that situation.

CONCLUSION

For the above reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

BENDER & FRANKEL,
Attorneys for Petitioners.

LOUIS BENDER,
SANDOR FRANKEL,
Of Counsel.

APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit*

UNITED STATES COURT OF APPEALS
FOR THE CECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-fifth day of July, one thousand nine hundred and eighty.

Present:

HONORABLE WILLIAM H. MULLIGAN,
HONORABLE THOMAS J. MESKILL, *Circuit Judges,*
HONORABLE JAMES S. HOLDEN, *District Judge.***

Docket Nos. 80-1027, 80,1067, 80-1104

UNITED STATES OF AMERICA,

Appellee,

v.

DOUGLAS P. FIELDS, FREDERICK M. FRIEDMAN and ALAN E. SANDBERG,

Defendants-Appellants.

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* N. B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

** Honorable James S. Holden, United States District Judge for the District of Vermont, sitting by designation.

Appendix A

Order

These are consolidated appeals by Douglas Fields, Frederick M. Friedman and Alan Sandberg from judgments of conviction entered in the United States District Court for the Southern District of New York, after trials upon indictment 76 Cr. 1022, certain counts of which had been severed with the consent of all parties. The first trial, before Hon. Charles S. Haight and a jury, resulted in a verdict adjudging Fields and Friedman guilty as charged of conspiracy, false statements to a government agency and three counts of securities fraud, and the second, tried to the Hon. Inzer B. Wyatt without a jury resulted in a verdict finding Friedman and Sandberg guilty of mail and wire fraud.

These causes came on to be heard on the transcripts of record from the court below, and were argued by counsel. We affirm all judgments of conviction.

Appellants' principal contention in No. 80-1027, the appeal from the first trial, is that the district judge erred in instructing the jury on the degree of intent required to convict on counts four and five, which charged that Fields and Friedman solicited proxies for re-election as officers and directors from shareholders of TDA Industries, Inc. and its subsidiary, Westcalind Corp. without revealing that they personally had received remuneration from those companies through various illicit activities and thereby violated Section 14 of the Securities Exchange Act, 15 U.S.C. § 78n, and Rule 14a-9 promulgated thereunder, 17 C.F.R. §240. 14a-9. Citing the second clause of Section 32(a), 15 U.S.C. § 78ff(a), appellants assert that the material information was omitted without the specific knowledge that by such nonfeasance they were violating the Securities Exchange

Act and that the court's jury charge that the defendants must have had a "general awareness of [their] wrongful conduct based upon a realization that [their] acts were wrongful under the securities laws," even read in conjunction with other pertinent instruction on the meaning of "knowingly" and "willfully" was inadequate to convey the requisite degree of intent.

The criminal penalties sought for the violations set forth in counts four and five could have been averred under the first clause of Section 32(a) which, appellants concede, requires only a general intent, *United States* v. *Chiarella,* 588 F.2d 1358, 1370 (2d Cir. 1978), *rev'd on other grounds,* 48 U.S.L.W. 4250 (U.S. Mar. 18, 1980); *United States* v. *Dixon,* 536 F.2d 1388, 1395-96 (2d Cir. 1976). We are unpersuaded that the prosecution herein was brought under the second clause of the "Penalties" provision of the Securities Exchange Act.

Assuming that the indictment was brought under the second clause of Section 32(a), and, assuming further that the second clause of Section 32(a) does in fact require a specific intent to violate a particular law or regulation, *but see* 3 Loss, Securities Regulation 1986-87 (1961) (clauses merely redundant), the instruction given by the district judge fairly fulfilled this hypothetical requirement. Furthermore, the type of charge envisioned by appellants was not appropriate to this case since they had presented no evidence nor raised any credible defense that the alleged violations were due to a good faith belief that the reporting of these matters was not required. *United States* v. *Dixon, supra,* 536 F.2d at 1397. Indeed, the evidence amply demonstrated that these omissions took place in the context of blatantly improper activities undertaken in great

secrecy by high corporate executives who were well versed in the rules and regulations of the Securities Exchange Commission. Finally, any conceivable shortcoming in the jury instructions was harmless in light of the wealth of inculpatory evidence concerning appellants' states of mind.

Appellants further charge a number of errors at trial, including the improper admission of hearsay "threat testimony," introduction of co-conspirator hearsay statements made after the purported termination of the scheme and the receipt of insufficiently unauthenticated correspondence which had allegedly been fabricated to document the efforts made by nominees who received fraudulent finders' fees which were later kicked-back in substantial part to appellants. These contentions are without merit for reasons well stated by Judge Haight. *See also United States* v. *Delillo,* slip op. 2817 (2d Cir. May 8, 1980). Likewise, we are unmoved by claims of impermissible pre-indictment delay, *United States* v. *Lovasco,* 431 U.S. 783 (1977), since there has been no showing of resultant prejudice, and neither do we find any fault with the district court's careful and painstaking handling of a potential jury taint, or in Judge Haight's conclusion that no member of the panel had been exposed to or affected by prejudicial extraneous matter. *United States* v. *Moten,* 582 F.2d 654 (2d Cir. 1978).

We have carefully considered the other caims of error and find them to be without merit.

Appellants' principal contention in Nos. 80-1067 and 80-1104, the appeals from the trial to the court on the severed counts of the indictment, is that the evidence was insufficient to convict Friedman and Sandberg since the government did not effectively counter their defense that

the payment to Sandberg, made under the guise of a finders fee, was compensation for legitimate services which had been previously performed. The main difficulty with appellants' claim is that Judge Wyatt rejected the factual underpinnings of this defense, and his refusal to credit the testimony of Friedman and the other major defense witness who testified in support of this position was not clear error.

In any event, we agree with the district court that the existence of a prior obligation would not constitute a complete legal defense to the charges. The fact that Friedman may not have benefited by this ruse or the fact that Sandberg did not receive compensation in excess of that to which he was entitled for legitimate prior services does not preclude a finding of fraudulent intent. Appellants improperly evaded the necessity of obtaining the appropriate corporate approval for this transaction, and thus defrauded the company and its shareholders. *United States* v. *Regent Office Supply Co.*, 421 F.2d 1174 (2d Cir. 1970), relied upon by appellants, is entirely distinguishable since in that case the misrepresentation was preliminary to and functionally unrelated to the deception whereas here, the false statements concerning Sandberg's entitlement to compensation for a corporate acquisition were essential to and bore directly upon the illicit venture. Thus, the evidence was sufficient for the trier of fact to conclude that appellants had the requisite intent to defraud even assuming the existence of a bona fide prior debt to Sandberg which they believed this payment discharged.

It is further asserted that the evidence was insufficient to establish the existence and contents of the phone calls and mailings upon which the charges were based, and that

it was not demonstrated that these communications were in furtherance of the scheme. Evidence of these communications was, for the most part, provided by parties to them, and their testimony was capable of being credited by the finder of fact. We have examined the record below and find that the evidence was sufficient to establish the fact and substance of the communications, and further find that while they were not essential to the success of the scheme they were plainly in furtherance of it. *United States* v. *Ford,* 603 F.2d 1043, 1047-48 (2d Cir. 1979); *United States* v. *Hasenstab,* 575 F.2d 1035 (2d Cir. 1978), *cert. denied,* 439 U.S. 827 (1979).

The district court's refusal to review the grand jury minutes to determine if there existed sufficient evidence on which to return an indictment was proper. *Costello* v. *United States,* 350 U.S. 359 (1956).

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgments of the district court be, and the same hereby are, affirmed. The mandate shall issue forthwith.

William H. Mulligan, U.S.C.J.

Thomas J. Meskill, U.S.C.J.

James S. Holden, U.S.D.J.

APPENDIX B

Judgments of the United States District Court for the Southern District of New York

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

DOCKET No. 76 Cr. 01022-01 (CSH)

UNITED STATES OF AMERICA

vs.

DOUGLAS P. FIELDS

Defendant

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government Lawrence Iason, AUSA the defendant appeared in person on this date 1-10-80 with counsel Louis Bender, Esq.

FINDING & JUDGMENT

There being a finding/verdict of Guilty on counts 1, 2, 3, 4 & 5. Title 18, U.S.C., 1001 and 2 and T. 15, U.S.C. Secs. 78n(a) and 78ff, 371. Defendant has been convicted as charged of the offense(s) of unlawfully, wilfully and knowingly, in the offer and sale of securities, by the use of means and instruments of transportation and communica-

tion in interstate commerce and by the use of the mails, and did conceal and cover up by trick, scheme, and device material facts, and did make false, fictitious and fraudulent statements and representations, and did make and use a false writing and document, and by use of the mails and by means and instrumentalities of interstate commerce did solicit proxies from shareholders, and conspiracy so to do. (Title 15, U.S.C., Secs. 77q(a).

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Six (6) Months on count 1, and fined $10,000.00 on count 1. Six (6) Months on each of counts 2, 3, 4, and 5 to run concurrently with each other, and concurrent with sentence imposed on count 1. Defendant is fined $10,000.00 on each of counts 2, 3, 4 and 5. Total fine of $50,000.00, a committed fine,

Stay all aspects of sentence for incarceration and fine pending appeal.

Defendant is released on his own recognizance pending appeal.

Signed by CHARLES S. HAIGHT, JR.
U.S. District Judge
Date 1-10-80

Appendix B

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

DOCKET No. 76 Cr. 01022-02 (CSH)

UNITED STATES OF AMERICA

vs.

FREDERICK M. FRIEDMAN

Defendant

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government Lawrence Iason, AUSA the defendant appeared in person on this date 1-10-80 with counsel Sandor Frankel, Esq.

FINDING & JUDGMENT

There being a finding/verdict of Guilty on counts 1, 2, 3, 4 & 5. Secs. 1001 and 2, and Title 15 U.S.C., Secs. 78n(a) and 78ff, 371.) Defendant has been convicted as charged of the offense(s) of unlawfully, wilfully and knowingly, in the offer and sale of securities, by the use of means and instrument of transportation and communication in interstate commerce and by use of the mails, and did conceal and cover up by trick, scheme, and device material facts, and did make false, fictitious and fraudulent statements

and representations, and did make and use a false writing and document, and by the use of the mails and by means and instrumentalities of interstate commerce did solicit proxies from shareholders, and conspiracy so to do. (Title 15, U.S.C., Secs. 77(a) and Title 18, U.S.C.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Three (3) Months on count 1, and fined $10,000.00 on count 1. Three (3) months on each of counts 2, 3, 4 and 5 to run concurrently with each other, and concurrent with sentence imposed on count 1. Defendant is fined $10,000.00 on count 2, and fined $5,000.00 on count 3. Total fine of $25,000.00, a committed fine.

Stay all aspects of sentence for incarceration and fine pending appeal.

Defendant is released on his own recogniznance pending appeal.

Signed by CHARLES S. HAIGHT, JR.
U.S. District Judge

Date 1-10-80

Appendix B

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

DOCKET NO. 76 CRIM 01022-04

UNITED STATES OF AMERICA

vs.

ALAN E. SANDBERG

Defendant

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date 03-06-80 with counsel L. Bender.

FINDING & JUDGMENT

There being a finding/verdict of Guilty. Defendant has been convicted as charged of the offense(s) of unlawfully and wilfully did use means of wire communications and the U.S. Mail for the purpose of executing a scheme and artifice to defraud.

(18 USC 1343 and 2) (18 USC 1341 and 2)

Appendix B

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Six (6) weeks on Counts 6, 7, and 10 to run concurrently with each other. Defendant is fined $1,000.00 on each of Counts 6, 7, and 10 for total fine of $3,000.00 a committed fine.

Sentence to be served on Fourteen (14) consecutive weekends. The period of confinement each weekend to be Three (3) days commencing at 6:PM Friday and ending 6:00 PM Sunday.

The fine to be paid within 30 days.

Counts 8 and 9 are dismissed on defendants motion.

Signed by INZER B. WYATT

Date 3-6-80

APPENDIX C

Extract of Petition for Writ of Certiorari
Re: *Frederick M. Friedman* v. *United States of America*

Reasons for Granting the Writ

1. The Court of Appeals' decision conflicts with the decision of the United States Court of Appeals for the First Circuit in *United States* v. *Rodman*, 519 F.2d 1058 (1st Cir. 1975) on the issue of whether a District Court may, in the proper exercise of its supervisory powers, dismiss an indictment where the indictment results from misconduct perpetrated by SEC attorneys upon the target of an SEC investigation.

The gross extent of the fraud perpetrated by the SEC's attorneys* is highlighted by the following undisputed findings of fact:

1. At the first meeting and at the subsequent meetings between petitioner's counsel (Gould) and the SEC's attorneys, Gould made the SEC attorneys "fully aware that defendants' counsel had as one of their two primary objectives the avoidance of a criminal reference. . . . Gould

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* Both SEC attorneys involved, Tucker and Perlmutter, were more than low-level functionaries at the time of their misconduct. "Tucker, although reporting to his superiors at the New York regional office, was in operational command of the inquiry. Perlmutter was his top assistant." (See District Court's finding of fact #20). During the course of the SEC's investigation in this case, Tucker became acting assistant regional administrator of the SEC's New York Regional Office and Perlmutter became a branch chief (pp. 545-547 of Joint Appendix in Court of Appeals).

again made clear to the SEC representatives that one of his primary concerns was to avoid a criminal reference* in respect to his individual clients (petitioner and co-defendants Fields and Davis)" (F**16, 19, 24).

2. "On June 17, 1975, in separate telephone conversations, Tucker advised Gould and Kantor that the SEC investigation was almost concluded; and that it appeared that the January 14 disclosures had been substantially complete and accurate." (F 21).

3. The minutes of the meeting of TDA's board of directors for July 18, 1975 state, *inter alia*:

> "Mr. Kantor reported that on June 17, 1975, a member of the SEC staff had informed him that their investigation was 95 per cent complete and that his staff would not refer the matter for criminal prosecution." (JA***401).

Fields and Friedman were present at this meeting and heard the statement (JA 475).

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* Testimony was given at the District Court hearing by William Nortman, Esq., who at the time of the SEC's TDA investigation was Assistant Regional Administrator of the New York Regional Office and at the time of the hearing was Associate Regional Administrator of the SEC's Atlanta Regional Office, that such negotiations —a negotiated civil settlement on the understanding concurred in by the SEC that the SEC would not make a criminal reference— were appropriate and proper at the staff level. (See pp. 743-747 of Joint Appendix in Court of Appeals).

** The letter "F" followed by a number designates reference to the District Court's numbered findings of fact (all of which are set forth at 7a-25a).

*** The letters "JA" followed by a number indicate page reference to the Joint Appendix in the Court of Appeals.

4. Petitioner (and co-defendant Fields) resisted the settlement terms initially demanded by the SEC, but were told by Gould "in response to their resistance that if Fields and Friedman did not authorize him to attempt to settle the case on the terms recommended by Gould, then the SEC would not be bound by the agreement which, in Gould's expressed view, it had made with them not to make a criminal reference." (F 25).

5. On September 16, 1975, the SEC filed its civil complaint. Gould believed this violated an agreement he had reached with Perlmutter that its filing would be deferred until the consent then being negotiated could be finalized and filed with the complaint. Gould angrily upbraided Perlmutter, and Perlmutter became "upset at the incident." (F 26).

6. Shortly after being upbraided by Gould, Perlmutter telephoned Assistant United States Attorney Sorkin "to urge that the United States Attorney's office 'investigate the TDA matter.' Perlmutter said that 'we really want to get TDA', but advised Sorkin that he first wanted to 'wrap up' the civil settlement before the United States Attorney began its own inquiry. Perlmutter made several other calls to Sorkin, of similar import, during October and November." (F 32).

7. On September 30, after Gould became ill and Judge Streit, his law partner, took over the representation of petitioner (and of co-defendant Fields), Judge Streit met with Tucker and Perlmutter. At this meeting the SEC attorneys announced that the money they would insist the defendants pay to TDA in order to settle the case had escalated to $585,000.00. "Judge Streit responded that it was a 'horrendous' amount, and there were serious questions concerning some of the figures, 'but in light

of the fact that there is to be no criminal prosecution I shall endeavor to obtain the money for you' (Tr. 150-153)." (F 27).

8. "Tucker and Perlmutter remained silent in the face of [Judge] Streit's comment." (F 27).

9. "[Judge] Streit reported this meeting to Fields, Friedman and Davis, including the above-quoted statement that had been made by Judge Streit to which the SEC representatives had not responded." (F 28).

10. At subsequent meetings over the next several months among Fields, Friedman, Davis, and their attorneys, "Fields, Friedman and Davis resisted the terms that the SEC was demanding for settlement of the civil case. However, their resistance was overcome by their attorneys' advice to them that the SEC had agreed that if a satisfactory settlement was made of the civil action, there would be no criminal reference." (F 28).

11. After Gordon, attorney for Mosler, was told separately by Fields and by Kantor that as part of the settlement the SEC had agreed not to make a criminal reference, Gordon scheduled a meeting with Perlmutter for the specific purpose of confirming it. At that meeting "Gordon advised Perlmutter that he represented Mosler, and stated to Perlmutter, among other things, that in deciding whether to accept a directorship in TDA it was important for Mosler to know whether there was going to be a criminal reference of the case. Gordon further stated to Perlmutter that Gordon understood there was not going to be a criminal reference. Perlmutter assured Gordon that there was not going to be a criminal reference. Gordon thereafter reported Perlmutter's assurance to Mosler and to Fields." (F 29).

Appendix C

12. Tucker and Perlmutter falsely testified at the hearing that the conversation to which Gordon testified did not occur (JA 575, SA*21). The Court expressly rejected their denials (F 29, JA 68). Tucker and Perlmutter also testified falsely at the hearing when they swore that Gould had been specifically told that there was "no deal on criminal". (F 24).

13. When Ostrow, counsel for co-defendant Sandberg, concluded he could not persuade Tucker and Perlmutter to pursue lightly, if at all, the complaint against Sandberg, "Ostrow agreed to recommend that Sandberg enter into a settlement, stating to Tucker and Perlmutter that settling would be 'better than going over to the golden dome', a reference to the United States Courthouse across the street from and visible from the window of the SEC's office. Ostrow's reference to 'going over to the golden dome' was intended by Ostrow to be a reference to facing a federal indictment. Under the circumstances, it was undoubtedly so understood by Tucker and Perlmutter, who chuckled at the statement but said nothing." (F 31).

14. On December 1, Gould and Judge Streit met with Tucker and Perlmutter to discuss the collateralization of petitioner's (and his co-defendants') substantial financial obligations under the settlement then in its final stages, and Gould told them they had "got a great settlement, take it". Right after Gould left, Tucker referred the case to the United States Attorney's Office (F 33; JA 205).

15. "At the time he made the criminal reference of the TDA case, Tucker knew that avoidance of a criminal reference was one of two primary objectives for Fields and

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* The letters "SA" followed by a number designate page reference to the Supplemental Appendix filed in the Court of Appeals.

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Friedman in the civil settlement negotiations (the other being their retention as corporate officers), and the only objective for Davis, an attorney who was not an officer . . . Notwithstanding that knowledge, Tucker at no time disclosed to counsel for these defendants that a criminal reference had in fact been made. That non-disclosure was calculated and deliberate, not inadvertent. Tucker testified that he did not want to do anything that would jeopardize the civil settlement (Tr. 1028-1029), and that, in his view, the defendants

> ". . . believed that there would be no criminal case growing out of this and that is why they entered into a consent decree. (Tr. 1091)." (F 25) (See also JA 634-JA 636).

16. "[H]ad [Gould] known, subsequent to December 1 but before execution of the consents to judgment, that a criminal reference had in fact been made, he would have recommended to his clients that they not enter into the consents . . . Such advice would have been accepted, so that the SEC would have lost the civil settlement which Tucker's concealment of the criminal reference was specifically designed to protect." (F 37; see also F 28 and F 39).

These undisputed facts* clearly show, as the District Court found, a gross fraud perpetrated by the SEC's attorneys upon petitioner—in the words of Circuit Judge Mansfield in his concurring opinion, "deceitful and duplicitous" conduct by the SEC's attorneys in violation of

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* It is most noteworthy that the Court of Appeals' decision, while not upsetting any of the District Court's findings of fact, chose simply to ignore virtually every one of the above highlights among those findings.

their "ethical obligation" owed to petitioner. It was in light of these and other findings of fact, none of which was disputed on appeal by the Government or overtly disturbed in any respect by the Court of Appeals, that the District Court exercised what it believed to be its supervisory powers and dismissed the indictment against petitioner.

The Court of Appeals' holding that the District Court "abused its discretion" in dismissing the indictment in the exercise of its supervisory powers clearly conflicts with the decision of the United States Court of Appeals for the First Circuit in *United States* v. *Rodman,* 519 F.2d 1058 (1st Cir. 1975), which expressly held that under identical circumstances the District Court's dismissal of the indictment was *not* an abuse of the District Court's supervisory powers.

In *Rodman,* the Court of Appeals for the First Circuit affirmed as "not an abuse of the [district] court's supervisory function"* the dismissal by the District Court of an indictment where SEC attorneys had failed to honor a commitment they had made to the defendant during the SEC's investigation that they would strongly recommend that the United States Attorney not prosecute the defendant. In both *Rodman* and the instant case the indictments resulted from misconduct committed by SEC attorneys against the targets of their investigation: In *Rodman* the misconduct was the failure by an SEC attorney to honor a commitment to recommend against criminal prosecution, and here the misconduct was fraudulently inducing petitioner to consent to an extremely onerous civil settlement on the understanding that there would be no criminal reference of the case while the SEC attorneys

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* 519 F.2d at 1060.

were at the very same time referring the case for criminal prosecution. The District Court in each case dismissed the indictment in the exercise of the District Court's supervisory powers; the First Circuit Court of Appeals held this not to be an abuse of the District Court's supervisory powers and the Second Circuit Court of Appeals held this to be an abuse of those powers.

The Second Circuit's attempt to distinguish *Rodman* from this case was limited to the following purported distinction:

> "The improper conduct here certainly was not as egregious as that in *United States* v. *Rodman*, 519 F.2d 1058 (1 Cir. 1975), where the SEC not only broke its promise but obtained incriminating evidence from the defendant in reliance on that promise. Moreover, the promise there was to 'strongly recommend' against prosecution." (98a)

It is respectfully submitted that these purported distinctions are in fact non-existent and that upon analysis these factors actually underscore the sharpness of the conflict between the decisions in *Rodman* and in this case:

(a) *As to the allegedly more "egregious" wrong in Rodman.* In *Rodman*, SEC attorneys merely broke a promise to the defendant; here, SEC attorneys committed the far more serious misconduct of deliberately committing a fraud against petitioner (and his co-defendants) by knowingly, wilfully, and fraudulently inducing him to consent to extremely onerous civil sanctions based on what the SEC attorneys knew to be the understanding of petitioner and petitioner's counsel that in exchange for these onerous sanctions there would be no criminal reference of this case, while at the very same time these same SEC attorneys were continually referring the case to—indeed urging it

upon—the United States Attorney's Office for criminal prosecution. Violation of an agreement made with the target of an investigation, as occurred in *Rodman,* is no more "egregious" than is the wilful and deliberate perpetration of a fraud and deceit upon the target of an investigation, as occurred here; to the contrary, the District Court in *Rodman* did not question the SEC attorney's good faith in that case, while here the District Court repeatedly found bad faith on the part of the SEC attorneys. The courts have traditionally treated fraud as far more serious misconduct than breach of an agreement. Moreover, the fraud* committed by the SEC attorneys here was compounded by the fact (as specifically found by the District Court) that at the hearing in the District Court in this case those same SEC attorneys lied under oath concerning the events in question (JA 575, SA 21, F 24).

(b) *As to the fact that in Rodman incriminating evidence was obtained.* The *Rodman* record, which was introduced in the District Court in this case, unequivocally shows that in *Rodman* the prosecutor agreed, during the course of the pre-trial hearing on Rodman's motion to dismiss the indictment, not to use any of Rodman's statements, and that the District Court in Rodman, in addition to its order dismissing the indictment, also alternatively suppressed Rodman's statements "in case some other court disagrees with me on the matter of the motion to dismiss" (JA 165). Thus in both *Rodman* and in the instant case the defendant was not prejudiced in an evidentiary sense, in that in both cases the defendant made no statement which the Government could use against him. In fact, in *Rodman* the defendant was not prejudiced at

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* The fraud was committed not only by the SEC attorneys' fraudulent omissions but also by their affirmative fraudulent misstatements (32a).

all in view of the Government's consent to and the District Court's entry of an alternative order that all incriminating statements he had made would be suppressed. In the instant case, to the contrary, petitioner was incurably prejudiced in a very practical sense. As the District Court found "it is impossible, by reopening the civil consent judgments, to restore the individuals concerned to the positions in which they found themselves at the time of the non-disclosure of the criminal reference, in December of 1975, and the subsequent execution of the consent judgments." (38a). The onerous terms of the consent judgments, which the SEC attorneys in charge of this investigation repeatedly characterized during the District Court's hearing as "superb"*, involved payment by the defendants of over one-half million dollars** and substantial ancillary relief involving multi-year prohibitions from holding corporate office, from holding corporate directorships, from voting

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* JA601-JA611. The reason advanced by Circuit Judge Mansfield for not dissenting—that the SEC would have received the case from the District Attorney's Office had the defendants not brought it to the SEC's attention themselves—misses the mark: if that had occurred, and had the SEC attorneys not engaged in their fraud on the defendants, then the defendants would not have consented to these extremely onerous civil sanctions. In other words, the defendants did not claim they were entitled to dismissal of the indictment because they had made a voluntary disclosure to the SEC, but because the SEC attorneys had (as the District Court found) defrauded them during settlement negotiations to induce their consent to these impressive civil sanctions. The SEC's fraud would be equally outrageous even if the D.A.'s Office had referred the matter to the SEC. (Furthermore, there was no evidence that the District Attorney's Office did in fact refer this matter to the SEC.)

** An amount, as the Government conceded below, in excess of the amount which the Government itself charged the defendants with having unlawfully received.

privately owned stock, severe injunctive relief, and the like; all of the terms are set forth at 22a-23a, fn. 2.*

(c) *As to the "strong recommendation against prosecution" to be made in Rodman.* In this case as in *Rodman,* had the Government not committed its misconduct there would have been no criminal case. The Government in this case has conceded that this matter came to the attention of the United States Attorney's Office only through the criminal references by Perlmutter and Tucker (JA 8-JA 9). Thus, had the SEC not perpetrated its fraud by referring this case for criminal prosecution, as the SEC attorneys knew was the petitioner's understanding at the time petitioner agreed to the onerous civil settlement here, there would have been no criminal prosecution.

Accordingly, it is respectfully submitted that the decision by the Second Circuit Court of Appeals in this case squarely conflicts with the decision of the First Circuit Court of Appeals in *Rodman,* and that only a decision by this Court can resolve this important conflict.**

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* Moreover, as one lower court has observed, the Government should be compelled to honor commitments in the interests of "judicial integrity and the interests of justice", even where there is "no prejudice, apart from that suffered by the administration of justice." *Matter of Doe,* 410 F.Supp. 1163, 1165, 1166 (E.D. Mich. 1976).

** Significantly, other federal circuit courts of appeals, when presented with a close parallel to the issue presented by this direct conflict between *Rodman* and the instant case, have resolved the issue in favor of permitting District Courts, in the exercise of discretion, to dismiss indictments. (See, e.g., *United States* v. *Minnesota Min.*

(Footnote continued on following page)

Appendix C

2. The Court of Appeals' decision in forbidding a District Court to exercise its supervisory powers to remedy a fraud perpetrated by a governmental agency upon a citizen has decided an important question of federal law vital to the administration of the laws by the SEC (and other governmental agencies) and to the administration of criminal justice, a question which has not yet been but should be decided by this Court.

The importance of the conflict referred to above is manifest not only because it is a conflict but additionally because it leaves unresolved the significant issue of whether a United States District Court, when confronted with an indictment which results from fraudulent misconduct on the part of the attorneys representing governmental agencies, has the power to deter future governmental miscon-

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(Footnote continued from preceding page)

& Mfg. Co., 551 F.2d 1006, 1112 (8th Cir. 1977) ("the remedy for the breach of this promise rests in the discretion of the trial court . . . and under the circumstances of this case we cannot say that the remedy of dismissing the indictment was undue or an abuse of discretion"); *United States* v. *Carter*, 454 F.2d 426 (4th Cir. 1972), cert. denied 417 U.S. 933 (1974)); this was the result mandated by this Court in *Santobello* v. *New York*, 404 U.S. 257, 263 (1971) ("the ultimate relief to which petitioner is entitled we leave to the discretion of the state court"); and other District Courts have also exercised their discretion in analogous situations in the same manner as the District Court in this case. (See, *e.g.*, *United States* v. *Phillips Petroleum Co.*, 435 F.Supp. 622 (N.D. Okla. 1977); *United States* v. *Paiva*, 294 F.Supp. 742 (D.C. D.C. 1969)). The cases cited in this footnote are analogous, not identical (although cf. *Elkins* v. *United States*, 364 U.S. 206 (1960)), as the misconduct therein was perpetrated by the prosecuting arm of the Executive Branch; *Rodman* and the case at bar, however, are identical and indistinguishable, not merely analogous, as in both cases the misconduct was perpetrated not by the prosecuting arm of the Executive Branch, but by attorneys for the SEC. *Rodman* and this case are absolutely irreconcilable.

duct and to grant reasonable redress to wronged parties by dismissal of the indictment.

The SEC refers approximately 100 cases per year to the Department of Justice for criminal prosecution.* This Court may also judicially notice that numerous other administrative agencies have the statutory authority to, and do, refer cases to the Department of Justice for criminal prosecution. There has been no dispute at any stage in this case—by the United States Attorney's Office, by the SEC, or by the Court of Appeals—that the District Court's uncontested findings of fact clearly establish that the SEC attorneys wilfully perpetrated an outrageous fraud upon petitioner and his co-defendants. This case thus presents the question of whether when an administrative agency perpetrates such an undisputed and adjudicated fraud upon a target of its investigation, a District Court is completely powerless to dismiss an indictment where no other remedy exists which would restore petitioner to his pre-victimized status.** This is, moreover, the second reported case

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* See SEC amicus curiae memorandum in the Court of Appeals, p. 13, n. 35.

** The District Court's finding that "it is impossible, by reopening the civil consent judgments, to restore the individuals concerned to the positions in which they found themselves at the time of the non-disclosure of the criminal reference, in December of 1975, and the subsequent execution of the consent judgments" (38a) was amply justified: petitioner was prevented for the full period dictated by the the settlement from acting as director of TDA and Westcalind, from serving as a chief executive officer of TDA and Westcalind, and from voting his shares of TDA and Westcalind stock, and, of course, paid out an enormous sum of money in settlement and was subjected to other substantial injunctive relief. Nor did the Court of Appeals question this finding. Even the Government in its appellate brief in the Court of Appeals abandoned the contention it had made in the District Court that the petitioner could be "made whole" by any remedy short of dismissal of the indictment.

within the last several years in which SEC attorneys have violated their legal and ethical obligations to subjects of SEC investigations.*

The importance of resolution by this Court of this significant question concerning the extent of the supervisory powers of federal District Courts under these circumstances is highlighted by the fact that the SEC has effectively announced that it will not undertake by itself appropriate steps to prevent a reeurrence of such fraudulent misconduct by its attorneys. In the Government's petition for rehearing in the District Court, the SEC advised the District Court that "on the basis of the factual findings contained in the opinion of the Court, the Commission has undertaken an independent inquiry in this matter at the conclusion of which the Commission will take all action which it deems appropriate." (JA 128). However, the SEC subsequently decided (without advising either the District Court or Circuit Court) to "defer" its inquiry until the conclusion of this very case (SA 1-SA 4). The SEC by its promise of action followed by its inaction has effectively served notice that only the exercise of judicial supervisory powers will prevent a repetition of this type of fraudulent misconduct.

Thus, the Court of Appeals' decision in this case, if permitted to stand, will not only stand in conflict with the First Circuit Court of Appeals' decision in *Rodman*, but will also result in this type of misconduct remaining uncorrected by the SEC, and will, further, be an open invitation to all Government agencies and their attorneys and other representatives to act as they wish, without any fear that their fraudulent misconduct, supported later by perjury, will be judicially dealt with in the strong

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* The other reported case being *United States* v. *Rodman, supra.*

terms such misconduct merits and which the District Court in this case (and in *Rodman*) properly invoked.

This Court has observed that

> "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *United States* v. *Russell,* 411 U.S. 423, 431-432 (1973).

We respectfully submit that in view of the gross fraud perpetrated by the Government agents here, this is that situation.

APPENDIX D

Order of the United States Court of Appeals Denying Petition for Rehearing

(Filed—September 2, 1980)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the Second day of September, one thousand nine hundred and eighty

Present:

HONORABLE WILLIAM H. MULLIGAN
Circuit Judge

HONORABLE THOMAS J. MESKILL
Circuit Judge

HONORABLE JAMES S. HOLDEN
District Judge

80-1027
80-1067
80-1104

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DOUGLAS P. FIELDS, FREDERICK M. FRIEDMAN and ALAN E. SANDBERG,

Defendants-Appellants.

Appendix D

A petition for rehearing having been filed herein by counsel for the defendants-appellants

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. DANIEL FUSARO
A. Daniel Fusaro
Clerk

Appendix D

Order of the United States Court of Appeals Denying Motion to Recall Mandate, etc.

(Filed—September 2, 1980)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the Second day of September, one thousand nine hundred and eighty

80-1027

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DOUGLAS P. FIELDS, FREDERICK M. FRIEDMAN,

Defendants-Appellants.

It is hereby ordered that the motion made herein by counsel for the appellants and set forthwith in appellants petition for rehearing to recall the mandate and to stay its reissuance pending application to the Supreme Court of the United States for a writ of certiorari be and it hereby is denied.

WILLIAM H. MULLIGAN

THOMAS J. MESKILL

JAMES S. HOLDEN D.J.

Circuit Judges